Town of Arlington
Legal Department

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To: Town Meeting Members

Cc: Arlington Board of Selectmen
Adam Chapdelaine, Town Manager
John Leone, Town Moderator

Date: April 21, 2021

Re: Zoning Updates for Town Meeting

Mr. Moderator and Members of Town Meeting, I write to provide you two updates for your information and consideration in advance of the 2021 Town Meeting and beyond. First, permit me to outline the impacts of Chapter 358 of the Acts of 2020 ("An Act Enabling Partnerships of Growth") passed in January of 2021, relative to Zoning Bylaw Amendments generally, and the specific proposals before you in this Town Meeting season. Second, allow me to summarize the Attorney General's Decision regarding Warrant Article No. 17 of the 2020 Special Town Meeting for the Members' understanding and future reference.

The Act: Zoning Amendments & Housing Choice Law

Chapter 258 of the Acts of 2020 ("The Act," also known in relevant parts as "Housing Choice Law") made some of the most significant changes to G.L. c. 40A (the Zoning Act) in many years. The critical pieces for Town Meeting's understanding are three fold. The Act:

1) *Provides Additional Definitions for Zoning Terms in c. 40A sec. 1A*

The Act provided specific definitions within c. 40A for terms which were previously undefined, including "Accessory Dwelling Units." Setting aside the substance of Article 43 before you, it is important for local zoning bylaw definitions and Zoning Act definitions to be compatible. The recommended vote from the ARB on Article 43 relative to Accessory Dwelling Units aligns our proposed local definition with the State's definition appropriately.

2) *Changes Quantum of Votes Required for Certain Zoning Bylaw Amendments*

Prior to passage of the Act all amendments to local zoning bylaws required a 2/3^{rds} vote of positive action by Town Meeting pursuant to c. 40A sec. 5. As revised, c. 40A sec. 5 requires a *simple majority* of Town Meeting to approve certain categories of zoning amendments including:

a. Bylaws that allow multifamily housing, mixed-use, accessory dwelling units, or open-space residential developments as of right;

b. Bylaws that allow multifamily housing, mixed-use, or an increase in density in multifamily or mixed-used developments, accessory dwelling units, or parking reductions in residential or mixed-use developments by special permit;

c. Bylaws that permit Transfer of Development Rights ("TDR") zoning or natural resource protection zoning in exchange for concentration of development in areas that a municipality deems "most appropriate," but which cannot result in a reduction in the maximum number of housing units that could be developed within Town;

d. Bylaws that amend existing zoning regulations to relax bulk and height of structures, yard sizes, lot area, setbacks, open space, parking and building coverage requirements to allow for additional housing units; and

e. Adoption of "Smart Growth" Zoning Districts pursuant to c. 40R.

Article 43 (Accessory Dwelling Units) is the only article the ARB has recommended for positive action that is subject to the revised simple majority quantum of vote in this year's Town Meeting.[1]

3) Institutes New MBTA Community Requirements

The Act also created a new section 3A under Chapter40A, mandating that each "MBTA Community" (including Arlington) establish a zoning bylaw that provides for at least one multi-family district of "reasonable size" for as-of-right multi-family housing. Section 3A further details statutory minimums for such multi-family housing zoning districts including:

a. Multi-family districts must have a minimum gross density of 15 units per acre;

b. Not be subject to age restrictions and suitable for families with children;

c. Be located not more than one-half mile from a commuter rail station, subway station, ferry terminal, or bus station.

As further detailed in the ARB's Report to Town Meeting under Article 37, there are financial penalties for failure to establish or maintain compliant MBTA Community multi-family zoning districts under the revised Zoning Act. However, given the timing of both the Act's passage and the lack of further detailed guidance from the State to date on this provision, the ARB recommends taking more time to develop any proposals relative the MBTA Community districts in Arlington. It is nonetheless important for Town Meeting to understand that the Town could lose access to important funding resources if compliance standards are not met in the future.

For further reading on the implications of the Act, please see the attached summary from the Executive Office of Housing & Economic Development's "Guidance for Local Officials on Determining Voting Thresholds for Zoning Ordinances and Bylaws."

[1] Members may take note that some of the proposed revisions regarding mixed-use residential development in to permissible Industrial Uses under Article 35 could potentially be presented as a separate article subject to a simple majority vote. However, given the timing of the passage of the Act the ARB had already developed much of its proposal for Industrial Districts in one comprehensive article which requires a 2/3rds majority vote under Article 35.

Attorney General's Office Decision re: 2020 STM Article 17

As Town Meeting knows, all Town Bylaws and Zoning Bylaws are subject to review and approval by the Attorney General's Municipal Law Unit pursuant to G.L. c. 40 sec. 32. Following submission of the Town Meeting-approved bylaw amendments from the November 2020 Special Town Meeting, the Municipal Law Unit offered the following comment in its March 18, 2021 Decision otherwise approving the bylaws amendments submitted from the 2020 Special Town Meeting:[2]

> ***Article 17*** *- Article 17 amends the Town's zoning by-laws, Section 3, "Administration and Enforcement," Subsection 3.1 (B), "Building Inspector; Enforcement," to add additional text to the end of Subsection 3.1 (B), as follows (new text in underline):*
>
> No person shall erect, construct, reconstruct, convert or alter a structure, or change the use or lot coverage, increase the intensity of use, or extend or displace the use of any structure or lot without applying for and receiving the required permit(s) from the Building Inspector. No such permit shall be issued until the Building Inspector finds that the applicant is in compliance with the applicable provisions of Title VI, Article 7 of the Town Bylaws.
>
> *Subsection 3.1 (B) as amended requires compliance with Title VI, Article 7 of the Town's general by-laws before the Building Inspector shall issue a "permit." Title VI, Article 7 of the Town's general by-laws pertains to "Notice of demolition, open foundation excavation, protected tree removal, new construction or large additions" and requires that prior to the commencement of certain site work or within seven calendar days of the filing of an application for a building permit, the owner will give notice to all abutters within 200 feet of such site work. See Title VI, Article 7 (A).*
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> *It is unclear what the Town means by "permit" and whether this refers to a building permit. However, Subsection 3.1 (B) cannot be applied to authorize the withholding of the building permit for failure to comply with the general by-law requirements in Title VI, Article 7, as explained in more detail below.*
>
> *The State Building Code ("Code") governs the issuance of a building permit. See State Building Code, 8th Edition, 780 C.M.R. §§ 105.3.1. More specifically, the Code requires the Building Inspector (as Code Enforcement Officer under the Code) to issue a building permit where the applicant has demonstrated compliance with the Code and the town's zoning by-*

[2] The MLU also provided comment under Special Town Meeting Article 8's quorum provisions for the Affordable Housing Trust Fund Board of Trustees, noting that a quorum is a majority of members regardless of any vacancy or absences on such Board pursuant to the Open Meeting Law.

laws. 780 C.M.R. § 105.3.1; see also G.L. c. 40A, § 7. In addition, G.L. c. 40A, § 7 authorizes the withholding of a building permit only if the applicant's proposed project is in violation of the town's zoning by-laws. Thus, a town cannot withhold a building permit for failure to comply with a town's general (non-zoning) by-law requirements. The Town must apply Subsection 3.1 (B) consistent with the requirements of the State Building Code. The Town should discuss any questions on this issue with Town Counsel.

In brief, while to this Office's recollection of the Meeting, the proponent of Article 8 merely intended to create a cross-reference in the Zoning Bylaw to the Town Bylaw's "Good Neighbor" notification requirements, the Municipal Law Unit stressed that issuance of a Building Permit cannot ordinarily be predicated upon compliance with a Town Bylaw (as opposed to a Zoning Bylaw). There are modest exceptions to this general rule, including the subject of Article 7 at this 2021 Town Meeting because state law specifically authorizes *both* zoning and town bylaw requirements regarding earth (and rock) removal. Nonetheless, for both this Office and Town Meeting, the Attorney General's MLU affirmed a conservative interpretation of the general rule that building permits may not be conditioned on compliance with Town Bylaws, which also effectively means that those matters which are not the legal subjects of zoning cannot serve as predicates to the issuance of building permits.

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GUIDANCE FOR LOCAL OFFICIALS ON DETERMINING VOTING THRESHOLDS FOR ZONING ORDINANCES AND BYLAWS

Chapter 358 of the Acts of 2020 (sometimes referred to as the economic development legislation of 2020) made several amendments to Chapter 40A of the General Laws, commonly known as the Zoning Act. Among these amendments are (1) changes to section 5 of the Zoning Act, which reduce the number of votes required to enact certain kinds of zoning ordinances and bylaws from a ⅔ supermajority to a simple majority; and (2) changes to section 9 of the Zoning Act, making similar changes to the voting thresholds for the issuance of certain kinds of special permits.

Section 100 of said chapter 358 directs "[t]he executive office of housing and economic development [to] issue guidance to assist local officials in determining the voting thresholds for various zoning amendments. Such guidance shall be assembled in consultation with the department of housing and community development, the Massachusetts attorney general's municipal law unit, and Massachusetts Housing Partnership." This guidance is intended to comply with that directive.

1. Where does the Zoning Act apply?

The Zoning Act applies to all cities and towns in Massachusetts except the City of Boston, which has its own zoning enabling act.

2. What kinds of zoning ordinance or bylaw can be enacted with a simple majority vote?

Under the newly amended section 5 of the Zoning Act, a zoning ordinance or bylaw can be enacted by a simple majority vote, rather than the ⅔ supermajority that applies to other zoning amendments, if that ordinance or bylaw does any of the following:

a. Allows for multi-family housing or mixed-use developments "as of right" in an eligible location.

b. Allows for open space residential development as of right.

c. Allows accessory dwelling units, either within the principal dwelling or within a detached structure on the same lot, as-of-right.

d. Allows by special permit accessory dwelling units in a detached structure on the same lot.

e. Reduces the parking requirements for residential or mixed-use development under a special permit.

f. Permits an increase in the permissible density of population or intensity of a particular use in a proposed multi-family or mixed-use development that requires a special permit.

g. Changes dimensional standards such as lot coverage or floor area ratio, height, setbacks, minimum open space coverage, parking, building coverage to allow for the construction of additional residential units on a particular parcel or parcels of land.

h. Provides for transfer of development rights zoning or natural resource protection zoning in instances where the adoption of such zoning promotes concentration of development in areas that the municipality deems most appropriate for such development, but will not result in a diminution in the maximum number of housing units that could be developed within the municipality.

i. Adopts a smart growth or starter home district in accordance with section 3 of Chapter 40R of the General Laws.

Key terms such as "multi-family housing," "mixed-use development," "accessory dwelling unit," "transfer of development rights zoning," "natural resource protection zoning," and "eligible location" are now defined in section 1A of the Zoning Act.

3. Who decides which voting threshold applies to a particular zoning proposal?

Section 5 does not specify who determines whether a proposed zoning ordinance or bylaw is the kind that can be approved by a simple majority vote. The proponent of a zoning ordinance or bylaw that allows or facilitates the development of new housing should include in the petition a statement explaining if it meets any of the criteria for being approved by a simple majority vote. The Zoning Act provides that no vote on a proposed zoning amendment may occur until after the planning board in a city or town, and the city council (or a committee designated or appointed by the council) each has held a public hearing on the proposal. Additionally, no vote to adopt a zoning ordinance or bylaw may be taken until the planning board has submitted a report and recommendations to the town meeting or city council, or 21 days have elapsed after the hearing without submission of such report. It is recommended that the planning board, after consultation with municipal legal counsel, include in this report a determination of which voting threshold applies to the zoning proposal. The legislative body's vote consistent with that recommendation will affirm the voting threshold.

Under section 32 of chapter 40 of the General Laws, all zoning bylaws adopted by a town must be submitted to the Attorney General for review and approval. A request for approval must

include adequate proof that the town has complied with all of the procedural requirements for the adoption of the bylaw. If the Attorney General finds an inconsistency between the proposed bylaw and state law, the bylaw or portions of it may be disapproved.

4. How do I know if a particular land area qualifies as an eligible location?

Section 1A of the Zoning Act defines "eligible locations" as areas that by virtue of their infrastructure, transportation access, existing underutilized facilities or location make highly suitable locations for residential or mixed use smart growth zoning districts or starter home zoning districts, including without limitation: (i) areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals; or (ii) areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns and existing rural village districts.

Section 5 does not specify who determines whether the land area subject to a proposed zoning ordinance or bylaw is an eligible location. The proponent of a zoning ordinance or bylaw that allows or facilitates the development of new housing should include in the petition explaining if the land area affected meets any of the criteria for an eligible location. As noted above, no vote to adopt a zoning ordinance or bylaw may be taken until the proposal has received a public hearing and the planning board has submitted a report with recommendations to the town meeting or city council, or 21 days have elapsed after the hearing without submission of such report. It is recommended that the planning board, after consultation with municipal counsel, include in this report a determination of whether the affected land area is an eligible location, when such a determination is relevant to the voting threshold.

5. Is there any additional guidance for determining eligible locations?

The same definition of "eligible location" that appears in section 1A of Chapter 40A also appears in section 2 of Chapter 40R. The regulations implementing Chapter 40R (760 CMR 59) set forth detailed criteria that the Department of Housing and Community Development (DHCD) applies when it determines if a land area is an eligible location under that statute. Although 760 CMR 59 does not apply to Chapter 40A, municipalities may reasonably look to those regulations for additional guidance on what areas should be deemed eligible locations under Chapter 40A.

Under the statutory definition, a land area qualifies as an eligible location if it is located "near" a transit station, including rapid transit, commuter rail or bus or ferry terminals. Any parcel that is at least partially within 0.5 miles of the kind of transit station listed should be deemed to be an eligible location.

In addition, the statute includes within the definition of "eligible location" parcels that are within "an area of concentrated development, including a town or city enter, or other existing commercial districts, or existing rural village district."

All other land areas may be determined to be "eligible locations" if, in the judgment of the planning board, the land area is a highly suitable location for residential or mixed-use development based on its infrastructure, transportation access, or existing underutilized facilities.

If there is uncertainty about whether a zoning proposal affects an eligible location, the municipality may request an advisory opinion from the Executive Office of Housing and Economic Development. Such a request must be made by the mayor, city council, board of aldermen, or planning board (when the zoning amendment is proposed in a city); or by the select board or planning board (when the zoning amendment is proposed in a town). A request may not be made by an individual member of the council or board. Communities are encouraged to submit their request for an advisory opinion as early as possible in the zoning amendment process. The request should be made by completing the application at the following website: www.mass.gov/forms/request-an-advisory-opinion-on-ch40a-eligible-locations. EOHED will endeavor to provide a written advisory opinion within 30 days of receipt of a complete request.

6. What happens if a proposed zoning ordinance or bylaw includes some changes that can be adopted with simple majority vote, and other changes that require a ⅔ supermajority?

Section 5 as amended provides that "any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote." A proposed zoning amendment cannot be adopted by a simple majority vote if it is combined with an amendment that requires a ⅔ supermajority. Drafters of new zoning proposals should take care not to combine provisions that require different voting thresholds, so that proposals that will encourage new housing production will get the benefit of the simple majority threshold. If a municipality desires to combine proposals with different voting thresholds, the municipality should first confer with municipal counsel, and review the guidance issued by EOHED. In the case of a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to "preside and regulate the proceedings, and decide all questions of order"—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. *(Updated: April 9, 2021)*

7. What is a special permit and what are the required thresholds for special permit votes?

Section 9 of the Zoning Act provides that zoning ordinances or bylaws can provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Zoning ordinances or bylaws may also provide for special permits authorizing increases in density or intensity of a particular use in a proposed development if the petitioner or applicant agrees to conditions that serve the public interest. Special permits may also issue for other purposes set forth in section 9.

A special permit can be granted a ⅔ vote of boards with more than 5 members, a vote of at least 4 members of a 5-member board, and a unanimous vote of a 3-member board. But, the recent amendments to section 9 provide that a special permit may be issued by a simple majority vote if the special permit does any of the following:

- Permits multi-family housing that is located within ½ mile of a commuter rail station, subway station, ferry terminal or bus station; provided that not less than 10% of the housing is affordable to and occupied by households whose annual income is less than 80% of the area median income and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184.

- Permits mixed-use development in centers of commercial activity within a municipality, including town and city centers, other commercial districts in cities and towns and rural village districts; provided, that not less than 10% of the housing meets the same standard of affordability as noted above.

- Permits a reduced parking space to residential unit ratio requirement, provided such reduction in the parking requirement will result in the production of additional housing units.

8. Where can I find additional guidance about the voting thresholds for zoning ordinances and bylaws?

Answers to frequently asked questions (FAQs) will be posted at www.mass.gov/info-details/housing-choice-and-mbta-communities-legislation. Questions about zoning thresholds that are not answered in the FAQs can be directed to the Executive Office of Housing and Economic Development at housingchoice@mass.gov.

9. My town is planning a comprehensive update of our zoning bylaws to eliminate inconsistencies and make the bylaws easier to use (for example, by consolidating all definition in a new section). Can this be done by a vote on a single article that amends and restates the entire zoning code, as originally planned? Or should we delay the vote so that the existing provisions that qualify for a simple majority vote can be presented as separate articles?

You may proceed with a vote as planned, consistent with the following guidance. Section 5 of the Zoning Act now provides that "any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote." The intent of this language is to ensure that certain zoning changes that make it easier to build new housing will have the benefit of the simple majority threshold. If a city or town is considering an existing proposal to amend and restate its entire zoning code with a single vote, and there is not enough time to separate amendments that have different voting thresholds, it may proceed as planned rather than starting over or delaying the vote. Although the statute does not say so expressly, in the view of EOHED, the combined article may be approved by a ⅔ vote. The Attorney General has not yet taken a position on this question. The city or town alternatively may elect to delay the vote and separate out the zoning provisions that have different approval thresholds. Going forward it is the recommendation of EOHED that proposals to amend and restate an entire zoning code should be drafted so that housing-friendly provisions that qualify for approval by a simple majority approval are considered separately, if possible. In all cases, the municipality should consult with municipal counsel regarding the appropriate quantum of vote. In the case of

a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to "preside and regulate the proceedings, and decide all questions of order"—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. *(Added: April 9, 2021)*

10. My town is considering a new overlay district in which a mixture of retail, hospitality, recreational, entertainment, commercial and other uses will be allowed by right. Multifamily and mixed-use developments are among many types of uses that will be allowed in the new zone, along with things like retail, hotels, commercial recreational facilities, and entertainment uses. The new overlay district does not requires a proposed project to include a residential component. Does this overlay district qualify for the simple majority?

Section 5 of the Zoning Act now provides that "any amendment that requires a simple majority vote shall not be combined with amendments that require a two-thirds majority vote." The intent of this language is to ensure that certain zoning changes that make it easier to build new housing will have the benefit of the simple majority threshold. It also is intended to ensure that zoning proposals that otherwise would require a ⅔ vote are not approved by a simple majority simply because a multifamily use or other residential use has been added to the mix of allowed uses. This overlay district appears to conflict with the statute's prohibition on combined articles, since it combines uses that require a ⅔ vote with uses that may potentially qualify for a simple majority vote. In all cases, the municipality should consult with municipal counsel regarding the appropriate quantum of vote. In the case of a zoning bylaw amendment being considered at town meeting, the Town Moderator has authority to "preside and regulate the proceedings, and decide all questions of order"—potentially including the required quantum of vote—pursuant to G.L. c. 39, § 15. If the town meeting approves the amendment, will be subject to the review and approval of the Attorney General pursuant to G.L. c. 40, § 32. *(Added: April 9, 2021)*

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